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RE: *24-Inch Drainage Pipe on Jorgensen Forge Corporation Property*

Dear Ms. McCrea and Mr. Wright:

We represent the Jorgensen Forge Corporation (Jorgensen). This letter is sent in response to a letter you received from counsel for the City of Tukwila (City) dated July 6, 2009 regarding the City's position with respect to the 24-inch drainage pipe that runs along the northern edge of the Jorgensen property and discharges to the Duwamish Waterway (24-inch pipe). We disagree with a number of points made in that letter, as discussed below.

Before turning to those points, we note that the City's letter makes several factual assertions that are untrue. We do not see the need to correct all such assertions here, but we do want to call attention to two of them:

1. "Rather, the contamination about which Ecology is concerned resulted from discharges by Jorgensen that occurred years ago." *See* City's July 6, 2009 letter at page 3, paragraph 2. We are not aware of any evidence that Jorgensen is or was a source of contamination to the 24-inch pipe. As described in the technical memorandum dated July 28, 2005 (Attachment A), an extensive review of available information

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showed no documented use of polychlorinated biphenyls (PCBs) at the Jorgensen property with the potential to discharge to the 24-inch pipe.

2. "Tukwila is not discharging any pollutant, nor causing the discharge of any pollutant." *Id.* at page 4, last paragraph. This statement is contradicted by a report prepared for the City's Public Works Department entitled *PCB Source Control Investigation of the City of Tukwila Stormwater System* (PBS Engineering & Environmental, December 2008). As described in Section 4.2 of the *PCB Source Control Investigation* Report, sediment samples recently collected from two of six City catch basins along East Marginal Way contained concentrations of PCBs above the Ecology Sediment Management Standards (SMS) dry weight total PCB sediment quality standard (SQS) criterion of 0.13 milligrams per kilogram (mg/kg). While we can debate the extent to which the City's stormwater has contributed to PCBs in the 24-inch pipe, there is no question that PCBs have been documented in its stormwater solids that are discharged through the 24-inch pipe.

In its July 6 letter, the City states that the 24-inch pipeline on Jorgensen's property "was formerly part of a natural drainage way." Therefore, the City claims, it is entitled to continue discharging municipal stormwater through the pipe.

We agree that Washington law protects a landowner's right to continue using a natural drainage path. However, the pipeline on Jorgensen's property does not lie in a natural drainage path. The Washington Supreme Court determined more than 40 years ago that runoff from this part of the Duwamish Valley naturally drained to the Duwamish River before the river was straightened in the 1910s. This means that historically, runoff naturally flowed north and east from the vicinity of East Marginal Way, not south and west toward Jorgensen's property.

Before the Duwamish Waterway was created, the Duwamish River meandered through the flat Duwamish Valley in a series of oxbows. The River was straightened, leaving portions of these oxbow loops on either side of the newly formed Waterway. These loops are now referred to as slips.

In 1961, King County (County) filed a lawsuit to prevent Boeing from filling Slip 5, which is – or was, prior to being filled – immediately south of Jorgensen's property. The County claimed that Slip 5 "was originally and is presently a natural watercourse or drainway for properties lying east of East Marginal Way." *See King County v. Boeing Co.*, 62 Wn.2d 545, 551, 384 P.2d 122

(1963). Consequently, the County argued, Boeing could not fill Slip 5 and thereby deprive the County of a drainage path for stormwater from Boeing Field.

The Court rejected the County's claim, stating that the "normal and natural drainage of surface waters from the properties lying east of East Marginal Way was originally and is presently north and northwesterly, rather than westerly toward Slip 5." *Id.* Therefore, the Court concluded, the County had no legal right to discharge stormwater through Slip 5.

Evidence presented in *King County v. Boeing* establishes that a natural drainage path never existed through Jorgensen's property. The County acknowledged in its brief to the Court in that case that "[f]ormerly, all surface water of Duwamish Valley inevitably drained into the River because there was no place else for it to go." *See* Brief of Appellant King County at 27. If surface waters in the Duwamish Valley inevitably drained into the River, they necessarily flowed away from Jorgensen's property. The drawing in the Court's opinion (Attachment B) illustrates this point. Jorgensen now owns a portion of the parcel marked as "John Buckley DLG" on the drawing – specifically, the portion located between the Duwamish Waterway and East Marginal Way. The Duwamish River flowed east of Jorgensen's property; no part of Jorgensen's property abutted a surface water body until the Waterway was constructed. Surface water from areas east of East Marginal Way could not have drained naturally through Jorgensen's property.

Even if historically there had been a natural drainage path through Jorgensen's property, an "upstream" landowner such as the City would be entitled to discharge only the volume of water that had naturally flowed there. Washington courts have stated repeatedly that the "common enemy" doctrine does not allow a landowner to "collect and discharge water onto their neighbors' land in quantities greater than, or in a manner different from, its natural flow." *See, e.g., Currens v. Sleek*, 138 Wn.2d 858, 863, 983 P.2d 626 (1999). The City discharges stormwater from approximately three acres of East Marginal Way to the 24-inch pipe. *See PCB Source Control Investigation Report* at Section 3.0. In 1996, the City installed 48 catch basins along the road to collect this stormwater. *Id.* at Section 3.2.

East Marginal Way is a heavily developed area, completely covered with impervious surfaces. As a result, the quantity of stormwater that runs off East Marginal Way far exceeds the quantity that would have drained from the area in its natural, undeveloped condition. Thus, even if the City could establish – contrary to the Court's findings in *King County v. Boeing* – that stormwater

runoff from the area of East Marginal Way naturally flowed through Jorgensen's property, it would have the right to discharge only a fraction of the stormwater that it has been discharging through the 24-inch pipe. In other words, under any circumstances the City would need to find an alternative discharge point for much of the stormwater that currently drains through the 24-inch pipe.

Finally, the City seems to assume that if it has a common law right to discharge through the 24-inch pipe, then it cannot be held responsible for any damage caused by its discharge. That is not true. Nothing in the drainage law would allow the City to discharge pollutants in violation of RCW 90.48, or would excuse it from liability for releasing hazardous substances through the 24-inch pipe. So even if there had been a natural drainage path through Jorgensen's property, and even if the quantity of the City's discharge were limited to the quantity that historically flowed through the path, it could not discharge contaminants with impunity. The City would remain liable for remediating any contamination it caused, including releases of PCBs in catch basin solids above the Ecology SMS criteria as documented in the *PCB Source Control Investigation Report*.

As the City acknowledged in its July 6, 2009 letter, it does not own the 24-inch pipe or the land on which it is located. Nor does the City have an easement permitting it to discharge through the 24-inch pipe. Since it has no ownership interest, no easement, and no rights under the common law of drainage, the City does not have a legal right to discharge its stormwater through the pipe.

Jorgensen does not discharge to the 24-inch pipe, and does not intend to maintain it simply for the convenience of others. The only other entity that discharges to the pipe, besides the City, is the County. In a letter to Ecology's Raman Iyer dated October 13, 2009, the County stated that it would cease discharging through the 24-inch pipe, and redirect its stormwater to Outfall #2. Accordingly, Jorgensen intends to close the 24-inch pipe and consider remedial options – including which parties should participate, financially or otherwise, in the remediation. As a courtesy, Jorgensen will notify both the City and County in advance of when the pipe closure is scheduled to occur.

While it wants to emphasize that it is under no obligation to maintain the 24-inch pipe, Jorgensen is willing to listen to any City proposal that includes adequate protections. At a minimum, this would include (1) retrofitting the 24-inch pipe to eliminate contact between City discharge and any contaminated sediments potentially residing within the 24-inch pipe; (2) instituting ongoing monitoring of the discharges following any retrofit to document that these

discharges are below the applicable water and sediment quality criteria; and (3) indemnifying Jorgensen against any future liability arising out of the City's discharge.

Sincerely,

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Encl.: Attachment A – Storm Drain Line Data Summary (Farallon 2005)
Attachment B – King County v. Boeing Co. (1963)

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